Supreme Court, U.S.
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No. 96-1701

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

C. D. VERNON, in his official capacity as Sheriff of Rockingham County, North Carolina,
Petitioner,

v.

WAYNE HARTER and ROBERT PAYNE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Is a North Carolina Sheriff entitled to Eleventh Amendment Immunity when the position is designated as an officer of "Local Government" by the North Carolina Constitution, State case law, and State legislation; when the State would not be liable -- financially or otherwise -- for any judgment; when the State exercises no control over the Sheriff beyond that exercised over cities or counties; when the county controls the Sheriff's budget and fills any vacancies; and when the Sheriff's authority is limited to his county's boundaries?

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STATEMENT OF THE CASE

Respondents Wayne Harter and Robert Payne served for numerous years as employees of the Rockingham County Sheriff's Department in North Carolina, working respectively as a dispatcher and a patrol deputy. According to their performance appraisals, they were meeting or exceeding all expectations.

Shortly after prevailing in a primary campaign in which he essentially used the Sheriff's Department as his campaign headquarters, petitioner, Sheriff C.D. Vernon, fired seven employees -- including Mr. Harter and Mr. Payne -- all on the same day. Tellingly, the Sheriff had been notified during the campaign that seven deputies were complaining that they were being forced to campaign for him. Other evidence also established that Sheriff Vernon was pursuing a vendetta to remove from his Department all employees whom he believed either had supported his primary opponent or had failed to support him adequately.

Respondents Harter and Payne brought suit alleging a violation of their First Amendment rights and a violation of North Carolina law. The United States District Court for the Middle District of North Carolina denied petitioner's motion for summary judgment as to plaintiffs' claims on the merits, but found that the Sheriff was entitled to qualified immunity. The court concluded, however, that the case could proceed against Sheriff Vernon in his official capacity since North Carolina Sheriffs are not entitled to Eleventh Amendment immunity. On Sheriff Vernon's appeal of the Eleventh Amendment decision, the Fourth Circuit affirmed with Judges Motz and Niemeyer joining in the majority opinion and Judge Russell concurring in the judgment. The court refused to hear the appeal en banc.

The North Carolina Constitution creates the office of Sheriff, but includes it within the article governing "Local

Government," together with provisions regarding counties, cities, towns, "and other governmental subdivisions." N.C. Const. Art. VII § 1. The North Carolina General Assembly has similarly stated that "[t]he sheriff is the only officer of local government required by the Constitution." N.C. Gen. Stat. § 17E-1. In fact, throughout North Carolina's General Statutes, the Sheriff's Department is characterized as a "local law enforcement agency" rather than a "state law enforcement agency." See, e.g., N.C. Gen. Stat. §§ 114-18.1, 143-166.50, 160A-288.2.

Further, the North Carolina courts have long understood the Sheriff to be a "law enforcement officer of the county." Southern Ry. Co. v. Mecklenburg County, 231 N.C. 148, 56 S.E.2d 438, 440 (1949). In Hull v. Oldham, 104 N.C. App. 29, 407 S.E.2d 611, 618, disc. rev. denied, 330 N.C. 441, 412 S.E.2d 72 (1991), the North Carolina Court of Appeals expressly refused to consider the Sheriff's Department to be part of the State for purposes of North Carolina's Tort Claims Act, N.C. Gen. Stat. § 143-291, pointing to the fact that the office of the Sheriff was created in the "Local Government" section of the Constitution and that North Carolina courts had consistently assumed that Sheriffs were local officers.

In North Carolina, the State has no control over the selection of Sheriffs. Initially, that is the responsibility of a county's citizens. N.C. Const. Art. VII § 2. If, however, a Sheriff wishes to resign, he must tender his resignation to the county commissioners and they may then appoint a new Sheriff. N.C. Gen. Stat. § 162-3. If a vacancy occurs for any other reason, it is also the responsibility of the county commissioners to elect a new Sheriff to serve the remainder of the term. N.C. Gen. Stat. §§ 162-5, -5.1. Further, if the board of county commissioners deems the Sheriff's bond to be insufficient, the Sheriff must forfeit his office and allow the board to choose a replacement. N.C. Gen. Stat. § 162-10.

The Sheriff's power is limited solely to acting within his county. N.C. Gen. Stat. § 162-14. But, within that county, he is autonomous. The State has no authority to veto or approve a Sheriff's actions. See A. Bell, County Government in North Carolina 498 (3d ed. 1989) ("the state generally exercises little control over local law enforcement operations (except by legislative enactment of the criminal laws themselves)"). If the State disagrees with how a Sheriff is running his department within his county, it can do nothing. Only the county electorate may evaluate whether the Sheriff is properly administering his office.

Accordingly, the General Assembly has acknowledged that it has no authority to regulate the education or training of a Sheriff. N.C. Gen. Stat. § 17E-11(a). Even when a Sheriff's Department provides assistance to a State law-enforcement agency, it retains its autonomy: the deputies "shall for personnel and administrative purposes, remain under the control of the local agency, including for purposes of pay." N.C. Gen. Stat. § 160A-288.2. See, e.g., Peele v. Provident Mutual Life Ins. Co., 90 N.C. App. 447, 450, 368 S.E.2d 892, 894 (1988) ("the control of the employees hired by the sheriff is vested exclusively in the sheriff").

In contrast to the Sheriff's general autonomy from the State, the county has been granted input into the functioning of the Sheriff's Department. It decides how many employees the Sheriff may have and approves the appointment of certain employees. N.C. Gen. Stat. § 153A-103. The North Carolina Workers Compensation Act deems deputy sheriffs to be employees of the county. N.C. Gen. Stat. § 97-2(2). The county also sets the amount of the Sheriff's bond and must approve that bond. N.C. Gen. Stat. § 162-8, -9. Most importantly, the county has the power of the purse: it funds the Sheriff's Department. N.C. Gen. Stat. § 153A-149(c)(18); C. Burgess, County Salaries in North Carolina 6, 13 (N.C. Institute of Government 1996).

REASONS FOR DENYING THE WRIT

In attempting to create a conflict between the decision below and this Court's decisions, petitioner substitutes selective quotations from all of the decisions for analysis of the decisions as a whole. When the entire panel opinion is reviewed, it is apparent that the court considered and appropriately weighed all of the factors set forth in this Court's Eleventh Amendment precedents. Indeed, the test for Eleventh Amendment immunity proposed by petitioner -- that only State law characterizations of the public office should be considered -- has no support in any of this Court's opinions.

Nevertheless, even if petitioner's standard were adopted, the result in this case would not change. As the district court and Fourth Circuit both found, North Carolina law considers Sheriffs to be local officials rather than State officers. No one on the Fourth Circuit has disagreed with this assessment. At best, petitioner presents a theoretical quarrel within the Fourth Circuit over the proper articulation of the test. Yet, the Fourth Circuit's analysis is in accord with ten Circuits' opinions. The consistency of analysis juxtaposed with the lack of dispute over the outcome renders this case an inappropriate candidate for Supreme Court review.

I. FAR FROM CONFLICTING WITH THIS COURT'S DECISIONS, THE FOURTH CIRCUIT OPINION PRECISELY PARALLELS THIS COURT'S ANALYSIS IN *HESS V. PORT AUTHORITY TRANS-HUDSON CORP.* AND *AUER V. ROBBINS.*

Petitioner Vernon first argues that the Fourth Circuit's decision conflicts with this Court's opinion in Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 115 S. Ct. 394, 130 L.Ed.2d 245 (1994). In considering whether a bi-state Port Authority was entitled to Eleventh Amendment immunity, the Hess Court initially considered various potential "indicators of immunity", including the authority of the State

over the Authority (through appointment of its governing body and control over its decisions), the classification of the Authority under the compact and its implementing legislation, State court characterizations of the Authority as a State or a local body, whether the Authority's functions were typically State or local, the State's degree of financial responsibility for the Authority, and the State's legal liability for the Authority's debts. 115 S. Ct. at 402-03. These factors pointed, however, in different and conflicting directions.

In that situation, the Court ruled, "the Eleventh Amendment's twin reasons for being remain our prime guide": the States' "solvency and dignity." Id. at 404, 406. In rejecting the defendant's contention that State control over the governmental body should be the determinative factor, the Court ruled that "rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal court judgments that must be paid out of a State's treasury." Id. at 404. The Court noted approvingly that the vast majority of the Courts of Appeals "have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." Id. at 404, 405.[1] The Court then ruled that the proper focus is on the obligation of the State to bear and pay any indebtedness: if any judgment would not have to be paid out of the State's treasury, "then the Eleventh Amendment's core concern is not implicated." Id. at 406.

Although arguing that the Fourth Circuit's opinion below conflicts with this decision, petitioner surprisingly does not report the Fourth Circuit's actual holding. In finding North Carolina Sheriffs ineligible for Eleventh Amendment

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[1] In fact, the Court pointed out that the Circuits were not in conflict "over the correct legal theory", but rather agreed that the impact on the State treasury was the most important consideration. Id. at 406. The courts differed only as to the factual question whether the Authority's debts were those of the parent States. Id.

immunity, the Fourth Circuit held that a court must first consider "whether the state treasury will pay any resulting judgment." App. A, 8a.[2] If the State will pay the judgment, then the defendant is entitled to Eleventh Amendment immunity without further inquiry. App. A, 9a.

If, however, the State would not be responsible for any judgment, "then 'the most salient factor in Eleventh Amendment decisions' weighs against a finding of immunity. . . . Although in that situation, a court should consider the other Ram Ditta [v. Maryland National Capital Park and Planning Commission, 822 F.2d 456 (4th Cir. 1987)] factors . . . ." App. A, 9a. The Ram Ditta factors include: (1) whether the State treasury will be responsible for paying any judgment; (2) whether the entity exercises a significant degree of autonomy from the State; (3) whether it is involved with local versus statewide concerns; and (4) how it is treated as a matter of State law. App. A, 12a. The State treasury factor still remains important and the lack of any impact weighs heavily against immunity. App. A, 9a.

The Fourth Circuit thus afforded the treasury factor significant -- but not conclusive -- weight in those circumstances when the State is not liable for the judgment. The court did not, however, sweep aside the State dignity concern. Mere recitation of the words "sovereignty" or "dignity" does not advance a court's Eleventh Amendment analysis. Instead, a court must identify some indicia suggesting impairment of a State's sovereignty or dignity. Here, the factors selected by the Fourth Circuit -- autonomy, nature of concerns, and State law -- appropriately test the effect of a lawsuit against a Sheriff on North Carolina's

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[2] All citations to the opinions below refer to the appendices to the petition.

sovereignty and dignity. These factors parallel those that this Court considered in Hess.[3]

Nothing in this analysis conflicts with this Court's holding in Regents of the University of California v. Doe, 117 S. Ct. 900 (1997). In Regents, the Court addressed "[t]he narrow question . . . whether the fact that the Federal Government has agreed to indemnify a state instrumentality against the costs of litigation, including adverse judgments, divests the state agency of Eleventh Amendment immunity." Id. at 902. There was no dispute that the University was ordinarily entitled to Eleventh Amendment immunity since a judgment against the University was a legal obligation of the State of California. Instead, the Court was considering whether Eleventh Amendment immunity could be removed as a result of insurance or indemnification.

The Court first noted that the Eleventh Amendment inquiry requires a court to examine the relationship between the State and the entity at issue, including consideration of "the provisions of state law that define the agency's character. Id. 904 n.5. The Court then repeated its holding in Hess that "the question whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued." Id. at 904. The Court clarified, however, that the issue is not ultimate financial liability, but rather "the entity's potential legal liability." Id. The Court explained: "Surely, if the sovereign State of California should buy insurance to protect itself against potential tort liability to

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[3] Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996), did not change the analysis in Hess, a decision that it did not even cite. Seminole Tribe addressed the question of when Eleventh Amendment immunity has been abrogated or waived. Since the State of Florida was the defendant, there was not any need to decide what entities are arms of the State. The Court would have no cause to discuss the significance of the treasury factor under these circumstances.

pedestrians stumbling on the steps of the State Capitol, it would not cease to be 'one of the United States.'" Id.

Petitioner Vernon has never contended that the State of North Carolina is potentially liable for a judgment in this case. It was not an issue before the Fourth Circuit. This omission is not accidental: No authority exists suggesting that North Carolina could be liable under any circumstances for the acts of a Sheriff. In fact, the insurance present in this case confirms that a North Carolina Sheriff is not an arm of the State. It was purchased by Rockingham County, not the State.

Further, petitioner ignores this Court's decision in Auer v. Robbins, 117 S. Ct. 905 (1997), decided the same day as Regents. In Auer, the Board of Police Commissioners contended that it was entitled to Eleventh Amendment immunity. The Court dismissed this contention in a footnote, pointing out that although the Governor appointed four of five board members, the City of St. Louis was responsible for the Board's financial liabilities and the Board was not subject to the State's direction or control in any other respect. Id. at 908 n.1. Here, the State plays no role in the selection or appointment of Sheriffs, the county is responsible for the Sheriff's Department financially, the Sheriff's Department incurs its own liabilities, and the Sheriff is subject to no direction or control by the State beyond that of other local governmental offices. Under the Auer analysis, the Sheriff is not entitled to Eleventh Amendment immunity.

Petitioner urges that "[t]he question of whether a particular entity is an arm of the State should be answered based on State law, in order to accord the States the respect owed to them as members of the federation." Pet. at 29-30. Petitioner thus contends that a State's lack of liability for a judgment should be irrelevant. None of this Court's decisions support limiting the Eleventh Amendment test to State law and excluding all consideration of the State treasury. It is

petitioner's position that conflicts with this Court's holdings in Hess, Regents, and Auer.

II. SINCE THE OUTCOME WOULD REMAIN THE SAME UNDER PETITIONER'S PROPOSED STANDARD, PETITIONER IS ASKING THE COURT TO ENGAGE IN AN ACADEMIC EXERCISE.

Even if petitioner's Eleventh Amendment test -- the characterization of the public office under State law -- were correct, North Carolina Sheriffs still would not be entitled to Eleventh Amendment immunity. Significantly, petitioner has made no showing otherwise in his petition. In short, petitioner is asking the Court to engage in an academic exercise.

The Fourth Circuit considered how North Carolina State law characterizes a Sheriff. App. A, 16a. After pointing out that [t]he relevant state constitutional and statutory provisions indicate that sheriffs in North Carolina are not state officials" and that the North Carolina Court of Appeals had held that "a sheriff is a local official,"[4] the court concluded that "state law treats sheriffs as local officials." App. A, 18a. As demonstrated above, the Fourth Circuit's assessment of North Carolina law was correct.[5]

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[4] Hull v. Oldham, 104 N.C. App. 29, 41, 407 S.E.2d 611, 618, disc. rev. denied, 330 N.C. 441, 412 S.E.2d 72 (1991).

[5] The only State authority cited by petitioner is Messick v Catawba County, 110 N.C. App. 707, 431 S.E.2d 489, disc. rev. denied, 334 N.C. 621, 435 S.E.2d 336 (1993), in which the North Carolina Court of Appeals concluded, as a matter of federal law, that a Sheriff could not be sued under 42 U.S.C. § 1983. Messick is of dubious authority, even in North Carolina, since it suggested that -- along with Sheriffs -- counties and county commissioners are also arms of the State and may not be sued under § 1983, contrary to federal law otherwise. The North Carolina Supreme Court has recently corrected the court of appeals' misunderstanding of federal law. Moore v. City of Creedmoor, __ N.C. __, 481 S.E.2d 14 (1997).

Nothing in the dissenting opinion of Judge Luttig to the denial of rehearing en banc suggests that the ultimate conclusion of the panel opinion was incorrect. He quarrels with the analysis by which that result was reached. Significantly, although Judge Russell -- who sat on the panel -- joined Judge Luttig's opinion, he also concurred in the panel's judgment. In other words, Judge Russell agrees that North Carolina Sheriffs should not be afforded Eleventh Amendment immunity. Since there is no significant dispute whether petitioner should be granted Eleventh Amendment immunity, this case does not present the best opportunity for the Court to revisit its Eleventh Amendment jurisprudence. [6]

III. THERE IS NO SIGNIFICANT CONFLICT AMONG THE CIRCUITS WARRANTING THIS COURT'S REVIEW.

Petitioner Vernon suggests that there is conflict and confusion within the Circuits as to the proper Eleventh Amendment test because "no two [tests] are exactly alike", even though petitioner acknowledges that the factors considered are "the same or similar." Pet. 18. The concern of this Court is not, however, whether courts parrot the language of each other, but rather whether the substance of the analysis is consistent from court to court.

A review of the decisions cited by petitioner reveals that the courts are substantially in sync. Although articulating the labels for the various factors differently, each of the

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[6] Petitioner also suggests that Cromer v. Brown, 88 F.3d 1315 (4th Cir. 1996) reveals disagreement within the Fourth Circuit. In reality, the differing results reflect application of petitioner's own standard. The law in South Carolina governing Sheriffs is significantly different than the law in North Carolina. App. A, 14a n2. In fact, Judge Michael, who wrote the Cromer opinion, joined in the decision not to rehear this case and Judge Russell, who joined Judge Michael's opinion, concurred in the judgment below.

circuits considers the characterization of the entity under State law, the autonomy of the entity from the State (including sources of funding, the legal structure of the entity, and the nature of its functions), the control or guidance exerted by the State, and whether the State would be liable for any judgment. See Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Authority, 991 F.2d 935, 939-43 (1st Cir. 1993); Mancuso v. New York State Thruway Authority, 86 F.3d 289, 293 (2d Cir.), cert. denied, 117 S. Ct. 481, 136 L.Ed.2d 375 (1996); Christy v. Pennsylvania Turnpike Commission, 54 F.3d 1140, 1144-45 (3d Cir.), cert. denied, 116 S. Ct. 340, 133 L.Ed.2d 238 (1995); Flores v. Cameron County, Texas, 92 F.3d 258, 265 (5th Cir. 1996); Hutsell v. Sayre, 5 F.3d 996, 999-1002 (6th Cir. 1993), cert. denied, 510 U.S. 1119, 114 S. Ct. 1071, 127 L.Ed.2d 389 (1994); Thiel v. State Bar of Wisconsin, 94 F.3d 399, 401 (7th Cir. 1996); Sherman v. Curators of the University of Missouri, 16 F.3d 860, 863-64 (8th Cir. 1994); Doe v. Lawrence Livermore Nat. Laboratory, 65 F.3d 771, 774-75 (9th Cir. 1995), rev'd on other grounds, 117 S. Ct. 900 (1997); Haldeman v. State of Wyoming Farm Loan Board, 32 F.3d 469, 473 (10th Cir. 1994); Hufford v. Rodgers, 912 F.2d 1338, 1341-42 (11th Cir. 1990), cert. denied, 499 U.S. 921, 111 S. Ct. 1312, 113 L.Ed.2d 246 (1991). The courts all agree that these factors should be balanced against each other to determine whether the entity is the State's alter ego.

The primary conflict exists between the Seventh Circuit and other Courts of Appeals. Nine other Circuits recognize, as stated in Hess, that the question whether the State would be liable for the judgment is the most important factor.[7] Contrary to petitioner's contention, the Eleventh Circuit has recognized the significance of this factor. In Hufford v. Rodgers, 912 F.2d 1338, 1342 (11th Cir. 1990), cert. denied, 499 U.S. 921, 111 S. Ct. 1312, 113 L.Ed.2d 246

[7] Neither the Fifth Circuit nor the D.C. Circuit has addressed how important this factor should be.

(1991), the court -- after noting that Florida was not liable for any judgment against a sheriff -- pointed out: "We have often stressed that the Eleventh Amendment is unlikely to protect an entity with 'fiscal autonomy.'"

In light of this consistency in views, the Fourth Circuit's decision below has created no conflict with the other Circuits. If the Court wishes to address the limited distinctions between the Seventh Circuit and the other courts, it would be more efficient to grant certiorari in a Seventh Circuit case.[8]

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[8] Petitioner focuses on the Seventh Circuit's holding that a Sheriff may be a State actor and entitled to immunity for some functions, but not for other functions. Since there is no dispute that North Carolina Sheriffs are not acting as State officers when performing personnel functions -- as petitioner Vernon was here -- this distinction is irrelevant to this case.